No. 15000

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

VICTORIA RUTH FOUGHTY HELLER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

CHARLES P. MORIARTY
United States Attorney
Western District of Washington

MURRAY B. GUTERSON
Assistant United States Attorney

OFFICE AND POST OFFICE ADDRESS:
1012 UNITED STATES COURTHOUSE
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BRIEF OF APPELLEE

I. STATEMENT OF JURISDICTION

The appellant, Victoria Ruth Foughty Heller, was indicted in the District Court of the United States for the Western District of Washington, Northern Division, in Cause No. 49239, on June 22, 1955. She, together with a codefendant, Cedric Theodore Berg,

was accused of having violated Title 18, United States Code, Section 2422, in the following manner:

> "That on or about April 13, 1955, CEDRIC THEODORE BERG and VICTORIA RUTH FOUGHTY HELLER did knowingly, wilfully and unlawfully persuade, induce and entice Rose Drucilla West, a female person, to go from San Francisco, California, to the Northern Division of the Western District of Washington, with the intent that the said Rose Drucilla West should engage in the practice of prostitution, debauchery, and for other immoral purposes, and did thereby knowingly cause the said Rose Drucilla West to go and be transported as a passenger upon the line and route of a common carrier in interstate commerce.
>
> "All in violation of Section 2422, Title 18, U.S.C.
>
> "A TRUE BILL." (R. 3-4)

Jurisdiction was conferred upon the District Court of the United States for the Western District of Washington, Northern Division, under the provisions of Title 18, United States Code, Section 3231. Since the charge involved the persuasion, inducement and enticement of the named female person to go from San Francisco, California, to the Northern Division of the Western District of Washington, venue was properly laid in said district court under the provisions of Rule 18 of the Federal Rules of Criminal Procedure and Title 18, United States Code, Section 3237.

Trial by jury was had, and a verdict of guilty was returned as to the appellant and her codefendant on September 30, 1955 (R. 4). On November 1, 1955, judgment was entered against both the appellant and the codefendant (R. 7-10), and on November 3, 1955, an order was entered denying the appellant's motion for acquittal and for a new trial (R. 11).

The jurisdiction of this Court to review the judgment of the district court is conferred by the provisions of Title 28, United States Code, Section 1291.

II. STATEMENT OF THE CASE

On April 13, 1955, one Rose Drucilla West, the female named as victim in the Indictment, traveled by plane from San Francisco, California, to the Northern Division of the Western District of Washington (R. 37). Mrs. West testified that during the period immediately preceding that date she was residing in Los Banos, California, some one hundred twenty-six miles from San Francisco (R. 20).

Mrs. West testified that prior to April 13, 1955, and specifically on Sunday, April 3, 1955, she received a telephone call during the course of which she conversed with the appellant (R. 29-31; 102-107). This call was established as having originated at appellant's

residence by the introduction in evidence of the appropriate telephone toll ticket (R. 142).

Mrs. West testified that during this conversation the appellant said:

> "Are you going to come up? Teddy told me about you. Why don't you come on up?" (R. 103)

The witness further testified that during this same conversation, the appellant also said:

> Then she said I could stay at the house with her and I didn't have to stay downtown, or nothing. I could stay right there and I didn't have to worry about anything. (R. 103).

The witness, Mrs. West, additionally testified that during this same conversation the appellant further told her:

> "Why don't you come up and try it." She said everything was O. K. "You can stay at the house with me. It is good and you can stay right here. Come and give it a try." (R. 105)

Mrs. West also testified that the appellant in this same conversation stated:

> "Things are all right; things are good." She said when I got to the airport to call the house and she would meet me at the airport (R. 106).

And further, the following exchange occurred during the testimony of Mrs. West relating to this same phone conversation with the appellant, and in response to a question put by appellant's counsel:

Q. Now, Miss West, on your first conversation that you claim you had with Mrs. Heller, she at no time told you she wanted you to come to Seattle for the purpose of practicing prostitution, did she?

A. She didn't use the words of that but she told me of her place and everything and said it was good money. (R. 105).

In addition to the foregoing, Rose Drucilla West also testified that "a couple of days" after the first telephone conversation, she again received a telephone call during the course of which she again spoke with the appellant herein (R. 32; 103-104). Mrs. West testified that during this second conversation, the appellant inquired as follows:

> She wanted to know why I didn't come up and I said I didn't have the money and she said they would send me the money and, "If you don't have your clothes ready, just throw them in a suitcase and you can straighten them out after you get here." (R. 104)

The witness, Rose Drucilla West, additionally testified that on April 7, 1955, she did in fact receive sixty dollars at the American Trust Company in Los Banos, California, which money had been transmitted via Western Union money order from Seattle, Washington (R. 33; 116; 135).

Mrs. West testified that, pursuant to Mrs. Heller's instructions (R. 106), she called the Heller

residence, telephone number Adams 5680, immediately upon her arrival at the airport in Seattle (R. 37). She stated that the appellant answered the phone and told her to "get a cab and come out to the house" (R. 38). Mrs. West testified that soon after arriving at the Heller residence, the appellant spoke to her as follows:

> Vicky told me about the way that she worked the prostitution and the way she took the money out and everything (R. 41).

Rose West also testified that the appellant explained the procedures at that time in more detailed fashion as follows:

> Well, she told me — Mrs. Heller told me — if I stay in the house and she had all the customers and they all came by call, and if I stay in the house she takes three dollars out of ten dollars when I have intercourse with the men when they pay me, and if I go out she takes four dollars out of the ten dollars. That is the way she divided up the money. (R. 42-43).

Mrs. West went on to testify that on the day of her arrival she had intercourse at the Heller residence with a man for which she received thirty dollars, which act of intercourse occurred while the appellant was present at the house (R. 43-44). Rose West further testified that she performed two additional acts of intercourse the following day while Mrs. Heller was at home, receiving a total of seventy dollars (R. 45). The witness, Mrs. West, stated that the entire one hundred

dollars she received was given to the appellant, who in turn returned Mrs. West the amount of sixty-two dollars (R. 46).

Rose West testified that on the evening of April 12, 1955, and just prior to leaving Los Banos, she "called the airport to see if I could get on the plane" (R. 36). She went on to then testify that when she arrived at the airport it was approximately eleven o'clock, "about one-half hour before the plane left" (R. 36). Further, that immediately upon arrival, she "went up to the Western Airline there and gave my name and got my ticket" (R. 37). She testified that the price of the ticket for a flight from San Francisco to the Seattle airport was "thirty-four dollars and a little bit over" (R. 37). Mrs. West also testified that the plane left San Francisco "at 11:45, right around midnight. The plane was a little late." (R. 37).

Another witness called by the Government, Joe Scarpete of Los Banos, California, testified that he drove Rose West from that community to San Francisco on the occasion in question (R. 109). Mr. Scarpete testified that Mrs. West brought luggage with her and that on arrival at the airport, "she went in first and a porter came and got the luggage" (R. 110). This testimony was substantiated by another witness, Tony Baffuna, who was a passenger in the car during

the drive from Los Banos to San Francisco (R. 112-113).

III. SUMMARY OF ARGUMENT

In her Specifications of Error, appellant sets forth two matters, listing subheadings (a) and (b) under her first Specification. In the Summary of her Argument, however, appellant sets forth four Contentions, each of which is treated in the following portion of her brief devoted to Argument.

Upon a careful reading of these four Contentions, it is our feeling that Contentions I and III are actually the same. Each asserts a failure of proof on the part of the Government as to appellant on the issue of her having persuaded, induced and enticed the interstate trip for the immoral purposes specified. We therefore will divide our Argument into three parts, answering appellant's Contentions I and III in Part A, her second Contention in Part B, and her fourth Contention in Part C.

We contend that the evidence introduced supports the finding that the appellant persuaded, induced and enticed Rose West to travel in interstate commerce, and that in the sense contemplated by the statute, the appellant did thereby knowingly cause the victim to so travel.

We further contend that the evidence supports the finding that the transportation of Mrs. West was as a passenger upon the line and route of a common carrier in interstate commerce.

And, finally, we contend that the instruction of the court, explaining the purpose of the law, was proper, and certainly cannot be relied upon as a sound basis for a claim of prejudicial error.

IV. ARGUMENT

A. *Sufficiency of Evidence to Establish Persuasion, Inducement and Enticement on the Part of Appellant.*

Appellant's position is that she could not have persuaded, induced and enticed Rose West to travel to Seattle because Rose West had already decided to so travel as a result of the persuasion applied by the co-defendant, Berg. Appellant herein argues that in March of 1955, a matter of ten to thirty days before the first telephone conversation in which she participated, the witness, Rose West, had already decided to come to Seattle. Mrs. Heller continues that, therefore, nothing she may have done can possibly be viewed as having been instrumental in persuading and causing the trip. And the appellant herein concludes, via her third Contention, that even if it were possoble for

her to have persuaded the victim to make the trip, there is a total dearth of competent and legally admissible evidence as against her to so establish.

We believe that there was an abundance of evidence which establishes the guilt of the appellant in this regard. We have attempted to set it forth herein under our Statement of the Case, setting out various portions of the actual conversation between the victim and the appellant over the long distance telephone between Los Banos, California, and appellant's residence on Mercer Island, King County, Washington. Incidentally, it should be noted that these conversations, though not testified to till redirect examination, constitute a part of the Government's case in chief inasmuch as it was only to permit argument of counsel that the court asked counsel for the Government to delay his interrogation on these matters (R. 40-41). The court specifically accorded Government counsel the privilege of returning to this subject by ordering him to proceed to another subject with the right to return to these conversations (R. 41).

These conversations clearly demonstrate that the appellant was urging the victim to make the trip, and held out the promise of a place to stay. Can we interpret the words: "It is good and you can stay right here. Come and give it a try." (R. 105) — as words

of anything other than persuasion, inducement and enticement? Is not the appellant doing just what the dictionary definition she sets out in her brief requires; namely, "to draw on by exciting hope or desire . . . often, in a bad sense, to lead astray, to induce to evil . . ."?

Besides, the simple fact is that the trip did not occur until after the two telephone conversations between appellant and victim. Are we to conclude that the content of those conversations does not provide a proper basis for jury consideration as to whether the words spoken operated to persuade, induce and entice? Such a position is completely untenable, and yet it is the one the appellant would have us adopt. The lack of logic in that position is even heightened when we further consider that upon arrival, the victim did actually live at appellant's home, did operate as a prostitute, and did divide her earnings therefrom with appellant. Upon such evidence, we are not compelled to conclude, as appellant would have us do, that the persuasion exerted by her was wholly without some significance.

In this regard, there is no question but that the conduct of the parties within a reasonable time before and after the transportation is admissible as properly bearing upon the intent with which the transportation

occurred. *Kelly* v. *United States*, (9 Cir. 1924) 297 F. 212; *Ammerman* v. *United States*, (9 Cir. 1919) 262 F. 124; *Womble* v. *United States*, (9 Cir. 1944) 146 F. 2d 263; *Long* v. *United States*, (10 Cir. 1947) 160 F. 2d 706; and *Dunn* v. *United States*, (10 Cir. 1951) 190 F. 2d 496.

In this same vein, it is also well settled that proof of persuasion, inducement and enticement can arise from the circumstances attending a transportation and from a consideration of the conduct of the parties within a reasonable time before and after. Cases so holding are *United States* v. *Reed*, (2 Cir. 1938) 96 F. 2d 785, and *United States* v. *Barton*, (2 Cir. 1943) 134 F. 2d 484.

Thus, we have abundant admissible testimony of actual verbal persuasion, and proof of conduct within the immediate three days after the trip which bears upon this question substantially. Such is unquestionably sufficient to make out a case for jury consideration.

This position is fully corroborated and actually strengthened by an examination of the precedent in this area of law. Such discloses that it is not even incumbent upon the Government to present a witness who will testify that she conversed with the defendant on trial and was told to do a particular thing or

to go to a particular place. In fact, even in the face of a witness who testifies that she was definitely not persuaded, induced or enticed to do a particular thing or to go to a particular place, circumstantial evidence will be deemed sufficient to prove these things. In this regard, there is an excellent *per curiam* opinion, concurred in by Judges Learned Hand, Augustus Hand, and Frank, in the case of *United States* v. *Barton* (2 Cir. 1943) 143 F. 2d 484, *supra*. That case involved a prosecution under former Section 399 of Title 18 of the United States Code, which section has now been codified, with slight alteration, as Section 2422, Title 18, United States Code.

The Court in that case stated, in part, as follows:

> "It is true that the girl herself vigorously denied that the accused had induced her to go, but the jury need not have accepted that, because from her testimony it appeared that it was her habit, when the accused called upon her, to entertain the customer selected for her, and to divide her earnings equally with the accused."

The case of *United States* v. *Reed*, (2 Cir. 1938) 96 F. 2d 785, *supra*, takes the exact same position. In that case, which was also prosecuted under the same portion of the White Slavery Act, the prosecuting witness testified that she was not persuaded or induced to go from Florida to New York by the appellant "because she had always wanted to go there and paid her

own transportation expenses." The Court still held that the jury had a right to consider all of the circumstances, and upon so doing could go beyond this testimony of the prosecuting witness and conclude that there was persuasion and inducement.

Another authority which casts considerable light on this discussion is the decision in *Cwach* v. *United States*, (8 Cir. 1954) 212 F. 2d 520. In that case, the defendant, Frances Cwach, was a woman who operated a house of prostitution in Sioux Falls, South Dakota. The victim therein, one Gloria Jordell, testified that she spoke with Frances Cwach over the long distance telephone line, pursuant to a telephone call placed by a codefendant of Cwach from Minneapolis, Minnesota, to Sioux Falls, South Dakota. The testimony concerning that portion of the case was as follows:

Q. All right. Now, at the time you had the telephone conversation you had been talking to Sutton, Batsell and Moore for all of that evening, is that correct?

A. Not all evening, I would say maybe two or three hours.

Q. Two or three hours, and it was decided that you would go down to Sioux Falls, is that correct?

A. That's correct.

Q. And your decision had been made?

A. Yes.

Q. And then a phone call was placed,. is that correct?

A. I hadn't made up my mind until I talked on the phone.

Q. Well, you stated that your decision had been made. Now, what is the Court and jury to believe?

A. I wasn't sure I could even get into Frances' place at Sioux Falls.

Q. In other words, you were going down there if she would have you, is that correct?

A. Yes, that's correct.

Q. So the decision for you to go had been made prior to the phone call?

A. If I could get in, yes.

The defendant Cwach argued that this evidence was insufficient to show that she induced, enticed or persuaded Gloria Jordell to come from Minneapolis to Sioux Falls to engage in the practice of prostitution. The Court, in refusing to accept this contention, held as follows:

> "Together with the direct testimony of the witness that defendant Cwach assured her that she would get along fine working in a house of prostitution, we think this evidence clearly warranted the jury in finding that defendant Cwach induced, enticed, or persuaded Gloria Jordell to travel in interstate commerce for the purpose of prostitution. A conviction has been sustained under the Act where, as part of the inducement, the defendant gave assurance of a place and a means to practice. *Schrader* v. *U. S.*, 8 Cir., 1938, 94 F. 2d 926;

U. S. v. *Sorrentino*, D.C. Pa., 1948, 78 F. Supp. 425; affirmed 3 Cir., 1949, 175 F. 2d 721."

In the present case, the appellant, Heller, gave assurance of a place to live as well as a place to practice prostitution. There can be no question but what her conversations with Rose West during the telephone calls placed to Los Banos, California, especially when considered in conjunction with the acts that occurred immediately upon Mrs. West's arrival, provided a proper basis for jury deliberation as to whether what the appellant said did in fact persuade, induce and entice.

Before concluding this portion of our Argument, we wish to briefly dwell on what proof is necessary to permit jury consideration as to whether the persuasion, inducement and enticement caused the transportation in the sense contemplated by the statute. The Court in the case of *United States* v. *Saledonis*, (2 Cir. 1937) 93 F. 2d 302, while considering a prosecution brought under the section of the White Slave Traffic Act which is now codified in Section 2422, Title 18, United States Code, stated as follows:

"The contention that there can be no conviction under Section 3 (18 U.S.C.A. § 399) unless it is shown further that the accused 'in some manner directly contribute to the transportation of the girl by common carrier' is unsound.

"It is also suggested that there must be some

> direct act showing an intent on the part of the inducer that the transportation shall be by common carrier. This section does not say so, but plainly says that one who induces and who shall 'thereby knowingly cause' interstate commerce by common carrier is guilty of the offense if such transportation follows: An affirmative directive act is not involved. The inducement in and of itself, without consideration of intent and with no further direct act, is the moving cause of what follows. The inducement may be any offer sufficient to cause the woman to respond. The inducement sets in motion the successive acts that constitute the crime. It is unnecessary to show control of the medium of transportation by the inducer. It is sufficient if the accused knows or should have known that interstate transportation by common carrier would reasonably result and if it does."

This same view is adhered to in the case of *Hardie* v. *United States*, (5 Cir. 1953) 208 F. 2d 694.

In the instant case, we have even a stronger showing because of Mrs. Heller's actual statement during the course of her second conversation with Rose West via long distance telephone that— "and she said they would send me the money" (R. 104).

Thus herein, there was substantial evidence of persuasion, inducement and enticement practiced by the appellant which thereby knowingly, as contemplated in the statute, caused the interstate transportation by common carrier for the immoral purposes alleged.

B. *Evidence That Transportation Was By Common Carrier*

In order to ascertain if the Government's proof was sufficient to permit the jury to determine whether the transportation was by common carrier, we should initially determine what test is to be applied in measuring that proof. An extensive examination of the authorities leads us to the conclusion that the proper test we must apply, or proper question we must ask, when all evidence has been submitted, is this:

Did the Government introduce some competent evidence upon which a jury could properly proceed, drawing those inferences which reasonably flow therefrom, to a finding that the mode of transportation was by common carrier?

We have set up this test for ourselves after examining the following cases:

United States v. *Feinberg*, (2 Cir. 1944) 140 F. 2d 592;

United States v. *Pape*, (2 Cir. 1944) 144 F. 2d 778;

United States v. *Cohen*, (2 Cir. 1944) 145 F. 2d 82;

United States v. *Hall*, (2 Cir. 1952) 198 F. 2d 726;

United States v. *Spagnuolo*, (2 Cir. 1948) 168 F. 2d 768;

Curley v. *United States*, (D.C. Cir. 1947) 160 F. 2d 229.

The last cited case referred to this matter in the following language:

> "The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter."

We have further examined the precedent in this Circuit, and find that the same test is applicable. This is revealed by the examination of a portion of the opinion in the case of *Banks* v. *United States*, (9 Cir. 1945) 147 F. 2d 628, which reads in part as follows:

> "An appellate court is limited in its review of the sufficiency of the evidence to the consideration of whether there was some competent and substantial evidence. On a motion for directed verdict, there is a preliminary question for the trial judge — whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed. O'Brien's Manual of Federal Appellate Procedure, 3rd Ed., 1941, c. III, p. 16."

The case of *Presley* v. *United States*, (9 Cir. 1945) 148 F. 2d 634, quotes the *Banks* case language just set out with approval.

Now that we have determined a proper criterion, let us apply it to cases which have been concerned with common carriers. At once we are confronted with *Coltabellotta* v. *United States*, (2 Cir. 1930) 45 F. 2d 117, which holds that testimony that a bus was driven by a conductor from Manhattan to Bogota, New Jersey, and took twenty passengers with tickets was not sufficient to submit the issue of "common carrier" to the jury.

Just seven years later, the Second Circuit, in an opinion by the same three judges who considered the *Coltabellotta* case, handed down a decision in *United States* v. *Saledonis*, (2 Cir. 1937) 93 F. 2d 302, *supra*. The holding therein was that an instruction advising the jury that the proof of transportation by common carrier need not be by direct evidence was not subject to criticism. No facts are set forth and the *Coltabellotta* case is not referred to, so it is difficult to formulate an opinion as to whether or not the 1937 thinking of the Court would have permitted the 1930 evidence to have been made the subject of jury consideration.

In the civil law field, the case of *Kamienski* v. *Bluebird Air Service*, (1944) 53 N.E. 2d 131, held

that proof that plaintiff purchased a ticket and was a passenger on defendant's twelve passenger sightseeing plane was sufficient to establish defendant as a common carrier. The opinion in *Cudney* v. *MidContinent Air Lines, Inc.*, (1953) 254 S.W. 2d 662, goes even further in holding:

> "However a commercial airline carrying passengers for hire is a common carrier and subject to the duties and liabilities of common carriers."

Thus, if we apply our test to the facts of a given prior case, i.e., did the proof bring forth some competent evidence upon which a jury could properly find the transportation involved to have been by common carrier, we could hardly state at this juncture that a decision reached in one case would necessarily influence another. Quite properly then, we should set forth every pertinent fact of the instant case, and then determine as a matter of logic whether we produced some evidence from which reasonable people could properly conclude that the mode of transportation herein was by common carrier.

This we have attempted to do in the concluding portion of our Statement of the Case, where we have quoted extensively from the testimony of Rose West (R. 36-37), as it bears upon this question, and also briefly alluded to testimony of two other witnesses called by the plaintiff.

Briefly, then, the record shows proof in the following particulars:

That Rose West left Los Banos by automobile with three friends at about 8 P.M. on April 12, 1955; that they arrived at the San Francisco airport around eleven o'clock "about one-half hour before the plane left"; that a porter emerged from that airport after Rose West first entered and carried her luggage for her; that before leaving Los Banos, Rose West had called the airport in San Francisco in order to determine if there would be room on the plane; that upon arrival at the San Francisco airport, Rose West went immediately to the Western Airlines window or place or business at the airport; that she simply gave her name to the person there and picked up her ticket; that she paid thirty-four dollars and some cents for her ticket; that this was the price charged for a flight from San Francisco to the Seattle airport; that "the plane was a little late" in leaving San Francisco, but that it took off "right around midnight" (R. 36-37).

Does the foregoing proof, and the inferences which reasonably flow therefrom, represent some competent evidence upon which a jury could proceed to a finding that the transportation of Rose West was upon a carrier which held itself out to the public as

engaged in the business of transporting persons or property from place to place for compensation?

We set out the foregoing question inasmuch as it is an accurate paraphrase of the court's instruction (R. 346), to which instruction no exception was taken, and which therefore became the law of the case. Now, certainly, the following inferences are reasonable ones:

That the carrier which transported Rose West had a definite place of doing business; that the carrier which transported Rose West took reservations by phone; that therefore the carrier which transported Rose West made space available to a member of the public by taking reservations by phone; that the carrier which transported Rose West did transport a person from one place to another for compensation; that the carrier which transported Rose West did issue a ticket to a person who had reserved space and who paid a prescribed compensation; that the carrier which transported Rose West was scheduled to leave the airport in San Francisco for Seattle at a definite prescribed time; that the carrier which transported Rose West was a plane operated by Western Airlines.

Quite assuredly then, we have a great deal of evidence from which, as a proposition of logic, a jury could unhesitatingly conclude that the mode of trans-

portation was by common carrier as that term was defined to them by the court. After all, the court, again without exception, had advised and counseled the jury as follows:

> "You must use your common sense, as men and women possessing some knowledge of the ways of the world, and, if, after examining carefully all the facts and the circumstances established by the evidence in this case, you can feel and say that you have a settled and abiding conviction of the guilt of the defendants, then you are satisfied beyond a reasonable doubt." (R. 342)

In addition, there are many circumstances herein which are considerably stronger than those in the *Coltabellotta* case, *supra*. There was no evidence at all in that case that the bus reserved space and took reservations by phone; there was no evidence whatsoever in that case that the bus catered to a prescribed schedule and left a certain point at a certain time; and, most pointedly, there was absolutely no showing that the bus belonged to a network or system within the common knowledge of all the populace; no evidence that the bus bore a name of significance.

The extreme importance of this last referred to circumstance is made abundantly clear by an examination of the most recent decision in this area of law, *Politano* v. *United States*, (10 Cir. 1955) 220 F. 2d 217. In that opinion, it was squarely stated that the

trial court could properly take judicial notice that in going from Price, Utah, to Grand Junction, Colorado, by a Continental Bus the victim went as a passenger by "common carrier".

The only facts which the Government's evidence brought to light on this issue in that case were these:

That the victim bought a round-trip ticket from Price, Utah, to Grand Junction, Colorado, at the Continental Bus Depot at Price, Utah; that the bus was late; that the bus stopped at the bus depot in Grand Junction; that the Chief of Police of Price, Utah, had observed the victim taking the eastbound bus out of Price, Utah, around noon; and absolutely nothing more. There was not a scintilla of any kind of evidence that the bus even took reservations, or that it was available to all members of the public indiscriminately, or that it had a specified price for transporting a person from a definite place to another definite place. And yet the Tenth Circuit clearly held that there were sufficient facts to sustain the finding of the trial court that Continental Bus Lines was "a common carrier".

In this connection, it is well to point out a facet of the *Politano* case result, which is of added significance. This is the circumstance that that case was tried to the court sitting without a jury, and hence the finding which the trial court made was not simply that the

circumstances were strong enough to permit submission of the case to the trier of the facts, but that the circumstances were sufficiently appealing to result in the finding that the transportation was by common carrier beyond a reasonable doubt.

On examination also, it can readily be seen that the *Politano* proof did not even include a showing that the bus took other passengers, which, of course, was established in the *Coltabellotta* case, *supra.* In short, the *Politano* facts are, if anything, less persuasive than those in the *Coltabellotta* case, except for one essential ingredient — the bus is named in the *Politano* case as a member of a well known line, Continental Bus Lines.

Our case, of course, concerns a transportation by Western Airlines, and coupling that circumstance with all attendant matters bearing on the type of flight involved as pointed out earlier herein, there was unquestionably sufficient evidence to submit the question of whether the transportation was by common carrier to the jury.

C. *Court's Right to Advise the Jury as to the Purpose of the Law Involved*

Appellant lastly contends that prejudicial error was visited upon her by the court in its instruction to the jury as follows:

"The law under which this indictment has been returned is a Congressional exercise of rightful power forbidding the use of interstate transportation and commerce as an agency to promote immorality such as prostitution and debauchery.

* * * * * * * * * * * * * * *

"The law is directed against the use of interstate transportation or commerce for immoral purposes or in promoting or carrying out such practices." (R. 347)

This instruction represents a comment by the trial court in effect advising the jury as to the purpose of the White Slave Traffic Act, and its basis in federal jurisdiction. The right to comment by the trial judge in the federal courts is a long recognized one, as is seen by examination of any number of cases:

Lovely v. *United States*, (4 Cir. 1949) 175 F. 2d 312;

Myres v. *United States*, (8 Cir. 1949) 174 F. 2d 329;

Fredrick v. *United States*, (9 Cir. 1947) 163 F. 2d 536;

Petro v. *United States*, (6 Cir 1954) 210 F. 2d 49;

Lott v. *United States*, (5 Cir. 1956) 230 F. 2d 915.

The following passage is in order in this discussion:

"Appropriate in this connection are the observations of Mr. Justice Harlan in *Rucker* v. *Wheeler*, 127 U.S. 85, 93, 8 S.Ct. 1142, 1146, 32 L.Ed. 102:

" 'It is insisted by the plaintiff that the court

went too far in its expressions of opinion upon the evidence bearing upon this issue and that what was said had practically the effect of taking the case from the jury. It is no longer an open question that a judge of a court of the United States, in submitting a case to the jury may, in his discretion, express his opinion upon the facts; and that "when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury," such expressions of opinion are not reviewable on writ of error'."

Fredrick v. *United States*, (9 Cir. 1947) 163 F. 2d 536, 548, *supra.*

As the case of *Lott* v. *United States*, (5 Cir. 1956) 230 F. 2d 915, *supra*, states, in reaffirming this right:

"And a federal court may express its opinion even with respect to the facts if it is made clear to the jury that they need not be bound by this opinion."

Because of this, it is well to note the portion of the court's charge in the instant case found at page 353 of the Record:

"As to what the facts prove, should you have an opinion that the Court, because of any ruling or because of any comment made or because of anything stated in these instructions, has expressed an opinion as to the guilt or innocence of the defendants or as to the credibility or weight of the testimony of any witness, I want to advise you that you should not be controlled or influenced in any respect by the Court's ruling when you are considering what the facts are. The Court's rulings are binding so far as you are concerned as to the law. So, again, what the facts

are, what you find them to be, that is your responsibility." (R. 353)

In the light of this statement, we cannot conclude that there was anything erroneous in the court's charge. After all, the court simply, and accurately, told the jury what Congress had in mind in passing this law. That what the court told the jury was a correct statement of the Congressional purpose is beyond question. See *Mortensen* v. *United States*, (1944) 322 U.S. 369.

Actually, the Court's language was, to our thinking, favorable to appellant. It advised the jury that the federal court in this prosecution is not interested in prescribing what moral standards must be adhered to in the community; further that the federal law does not punish anyone for being morally irresponsible. Instead, the court tells the jury that the federal law is only "directed against the use of interstate transportation or commerce for immoral purposes or in promoting or carrying out such practices." (R. 347).

This language could not help but intensify the jury's attention to the crucial point that what must be proven was the employment of interstate commerce to promote immorality. Such being the law, and the court having a duty to expound the law, and the court having told the jury to determine the facts, there can be no error predicated thereon.

V. CONCLUSION

The Government believes that the appellant herein was accorded a fair trial in all respects, and that the jury's verdict was based on substantial evidence. Because of this, we ask that the judgment be affirmed.

Respectfully submitted,

CHARLES P. MORIARTY
United States Attorney

MURRAY B. GUTERSON
Assistant United States Attorney